SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 776

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

ESSIE MAE REESE, AS ADMINISTRATRIX OF THE ESTATE OF ISAAC REESE, DECEASED, ET AL.

RESPONDENTS' BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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The opinion of the Circuit Court of Appeals is officially reported as *Dealer's Transport Co.* v. *Reese; Clark* v. *Same,* 138 F. (2d) 638.

Statement of the Case.

Petitioner was incorporated under the laws of Illinois many years before the War began (R. 23, 27, 34, 113). It engaged in business as a common carrier transporting motor vehicles from factory to dealer (R. 34, 36, 113). After the War came on it established a branch office in Atlanta, Georgia, and it transported as a common carrier for hire or reward trucks for the Government from Atlanta

to different other parts of the country (R. 30, 36, 111). In these transactions it issued its standard bill of lading wherein its liabilities and rights set forth were the same as any other common carrier for hire or reward (R. 34, 35). It selected its own employees or drivers to transport the trucks, and to do everything else pertaining to them (R. 30, 78, 79). It routed the trucks as it saw fit (R. 35, Sec. 2) and gave its own orders as to how to transport the trucks, and when and who would transport them as far as its employees were concerned (R. 110). Petitioner had charge of the vehicles and full control of them except that the Government required that they should not exceed a speed limit of thirty-five miles an hour and should be kept properly oiled and greased and of course limited by the instructions in the bill of lading as to the place of receipt and delivery of the trucks (R. 113, 114). The Government paid the petitioner a fixed rate for the transportation of the trucks (R. 31). In the language of petitioner's Branch Superintendent, "The Government paid us the same as any other shipper paid us for hauling freight for it, paid so much for hauling freight" (R. 113).

Petitioner never qualified under the Constitution and laws of Alabama to do business in Alabama, and has never designated or maintained an authorized agent in this State upon whom service could be had (R. 24, 27).

On May 27, 1942, the United States Government delivered to petitioner in Atlanta, Georgia, the truck involved in this case, and four other trucks to be transported by petitioner as a common carrier to New Orleans (R. 29). Petitioner upon receipt of the trucks issued its bill of lading, and routed the trucks over Highways 29, 80, 31 and 90 (R. 34, 35). Petitioner put Clark to drive the truck involved in these cases, and also put him in charge of the convoy of trucks then leaving Atlanta (R. 32).

Clark left Atlanta between 11:30 and 12 o'clock on the night of May 27th (R. 88). The next morning about 7 o'clock in Lowndes County on Public Highway 80 of the State of Alabama, between Montgomery and Selma, the tragedy, the foundation of these suits, took place (R. 89).

There was a wagon drawn by two mules going uphill on this Highway. The mules were walking. In the wagon were four human beings, Isaac Reese, the driver, Mack Reese, Elsie Mae Reese and Sarah Reese. These people were on their way to work their farm. The day was dry and sunshiny. The view behind the wagon was clear and unobstructed for a distance of a half to three-quarters of a mile (R. 97). The wagon was traveling on the right-hand side of the road. The right wheels of the wagon were off of the pavement on the shoulder of the road, the dirt part of the road, on an average of two feet four inches "up to the point of contact." Along this part of the road and for 102 paces behind the place of contact there was the yellow line which said to the drivers of vehicles on that highway, "Don't pass here." The wagon was in the lane of this yellow line. The next thing that happened is the truck driven by Clark struck the wagon from the rear. The next thing we see is an absolutely demolished wagon and nearby Isaac Reese, a bleeding and dying man; Sarah Reese, a dying woman, her left leg severed and "just a piece of skin holding it dangling in the air"; Mack Reese, an unconscious, broken-legged and otherwise injured man; a down and dying mule; another mule dying with a board driven through its body and extending about two feet on each side, and then a truck 132 feet up beyond the demolished wagon with the tire of the left rear wheel of the wagon on its right front bumper. Then we hear Clark say to those present that he was not asleep; that he pulled out to pass the wagon and a mule became frightened and bolted and jerked the wagon in front of him. He was carried to jail by the Sheriff

of the County and continued to adhere to this story (R. 44-70). He changed his statement, however, upon the trial of the cases and said he was asleep (R. 90).

On June 10, 1942, after the accident the Government issued its bill of lading which in no way changed petitioner from what it was, to wit, a common carrier of freight for hire or reward (R. 72-77).

The personal representatives of Isaac Reese and Sarah Reese brought suits for their respective wrongful deaths against petitioner in the Circuit Court of Montgomery County, Alabama. These suits were predicated upon the rights conferred upon them by Section 123, Title 7 of the Alabama Code copied in the Appendix of this brief. Mack Reese brought suit against petitioner for the serious and permanent injuries sustained by him. The complaints as amended each contained two counts, one based on simple negligence of Clark, and the other on his willfulness or wanton conduct. The plaintiffs in order to obtain service of process on petitioner proceeded as authorized by Section 199, Title 7 of the Alabama Code copied in the appendix of this brief. The cases were removed from the State Court to the Federal Court, and petitioner there moved to quash the service of the summonses and complaints upon it. The Court overruled these motions. The causes of action were consolidated. Three separate verdicts were rendered, one in favor of the personal representative of Isaac Reese for $10,000.00, one in favor of the personal representative of Sarah Reese for $6,500.00, and one in favor of Mack Reese for $8,500.00. Judgments were accordingly rendered.

The contentions of the petitioner here may be summarized as follows:

1st. Service of process on petitioner under Section 199, Title 7, Alabama Code 1940 was invalid (a) because petitioner corporation did not personally operate the motor

vehicle and did not own the legal title to it, and (b) because petitioner corporation had never qualified to do business in Alabama; and

2nd. Petitioner was privileged and immune from liability in each of the death cases and from punitive damages in the personal injury case because it was acting for the Government in transporting the trucks for the use of the Army in time of war.

Process.

The statute Section 199, Title 7 of the Alabama Code in pertinent parts is as follows:

> "The operation *by a non-resident* of a motor vehicle on a public highway in this state, *or the operation on a public highway in this state of a motor vehicle owned by a non-resident and being operated by such non-resident, or his, their or its agent*, shall be deemed equivalent to an appointment by such nonresident of the secretary of state of the State of Alabama, or his successor in office, to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint in any action against such nonresident growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such public highway; *or in which such motor vehicle may be involved while being operated on such public highway within the State of Alabama.*" (Emphasis ours.)

The statute further provided that it was not applicable to a foreign corporation that had qualified to do business in Alabama and designated an agent upon whom service could be had. This statute was enacted and became law in 1935. Respondents followed the statute to its letter and in its spirit in procuring service upon petitioner. This is not questioned by petitioner.

Does the word "nonresident" in this Statute include a nonresident corporation as well as a nonresident individual? The answer is manifestly "Yes" because (a) the word "**non**resident" is used with the same meaning throughout the Statute; (b) the use of the word "its" in the expression "such nonresident, or his, their or *its* agent" (emphasis ours) would be inappropriate or improper if the statute did not apply to a nonresident corporation; (c) by expressly providing that the statute should not apply to certain foreign corporations, i. e., those which had qualified to do business in Alabama and maintained an authorized agent upon whom service could be had, the legislature made its intention clear that it should apply to all other foreign corporations, those which had not so qualified.

In the case of *Jones* v. *Pebler*, 371 Ill. 309, 125 A. L. R. 451, 454, in construing the word "nonresident" in a similar statute, the Supreme Court of Illinois said:

> "The word 'nonresident' appears without definition, does not purport to be limited to nonresident natural persons, and is obviously broad enough to include every nonresident, individual or corporate, owner or non-owner, using and operating a motor vehicle over Illinois highways. In short, a non-resident, within the contemplation of Section 20a may be a non-resident corporation or an individual member of a non-resident partnership."

In that case, the Illinois Court further pertinently observed:

> "Section 20a expresses the manifest legislative intent of conferring jurisdiction of suits against nonresident motorists on the courts of Illinois to the end that compensation for injuries to local residents may be obtained. Admittedly, the policy is as desirable when the driving is done on behalf of a non-resident by an agent, chauffeur, servant, or a third person with

consent, as when by the nonresident himself. 'The potential harm,' it has been well said, 'is as great whether the nonresident owner himself or another be driving his car, and the necessity for resorting to substituted service is just as pressing.' Culp, 'Process in Action Against Non-Resident Motorists,' supra. Again, it has been pertinently observed: 'The large proportion of cars owned and operated by foreign corporations and partnerships was as obvious to the legislature as was the fact that a corporation can perform such physical acts as operating a car only through agents.' "

The Arkansas statute and the New York statute providing for constructive service of process on nonresident motorists, have each been held to apply to nonresident corporations as well as to natural persons. *Bischoff* v. *Wm. Schnepp* (1930) 249 N. Y. Supp. 49, 139 Misc. 293; *Alexander* v. *Bush* (1939) 199 Ark. 562, 134 S. W. (2d) 519.

The conclusion is inescapable that the Alabama Statute applies to nonresident corporations as well as to nonresident individuals. With that construction established, let us consider the meaning of each of the two acts which the statute says shall be deemed equivalent to an appointment by such nonresident of the secretary of state as an agent to receive service of process.

1st. "The operation by a nonresident (corporation) of a motor vehicle on a public highway in this state." (Parenthesis supplied). As said by the Court of Appeals, "The proposition that a corporation can operate a motor vehicle only by its agent is not open to dispute."

2nd. "The operation on a public highway in this state of a motor vehicle owned by a nonresident and being operated by such nonresident, or his, their or *its* agent." (emphasis ours).

If petitioner is right in its contention, then it would follow that a nonresident thief of an automobile, or a nonresident corporation or individual who, in good faith, bought an automobile from a thief, or a nonresident individual or corporation who borrowed an automobile from another, or a nonresident individual or corporation who rented or hired an automobile from another, or a nonresident individual or corporation who obtained possession of an automobile under a conditional sale contract wherein the title was reserved until the full agreed-on purchase price was paid and who had paid all of this price except one dollar, or a nonresident individual or corporation bailee who had dominion and control of an automobile, *could by his or its agent operate* the automobile upon the highways of Alabama and be immune from service or process upon it. Why? Because petitioner says the "legal title" was not in him or it, but was in one from whom he or it obtained the automobile.

It is certain that the Legislature in the passage of the law in using the word "owner" was not dealing with the person who had the legal title to the automobile, but with the person who was in possession of or had dominion over the automobile with the power to operate or direct its operation. The Legislature was not aiming at nor concerned with who would prevail in an action involving the title to the automobile, but was aiming at and concerned with who would be liable for the operation of the automobile on the highways of Alabama.

In the case here the legal title to the automobile was in the Government, but the Government under contract with petitioner delivered the automobile to petitioner as an independent contractor or common carrier to be transported to New Orleans. When this was done the relationship of bailor and bailee was created. The bailee then became the owner of the automobile *as to all of the world except as to*

the bailor. The bailee and not the bailor was then responsible and liable for the operation of the automobile. Authorities are not needed to support the foregoing statements, yet we will take the liberty of here briefly referring to some of them.

In referring to an Alabama statute, the Court of Appeals of Alabama in the case of *Lockhart* v. *State*, 6 Ala. App. 62, speaking through its presiding Judge Richard W. Walker, afterwards presiding judge of the Fifth Circuit Court of Appeals, said:

> "The words 'the lands of another' are comprehensive enough to include lands possessed or occupied by one who is not the holder of the fee, and the word 'owner' is not infrequently used to describe one who has dominion or control over a thing, the title to which is in another. Johnson *v.* State, 1 Ala. App. 148, 55 South. 268; 6 Words & Phrases, p. 5148. In view of the manifest purpose of the statute to limit the hunting privilege to authorized persons, we are of opinion that the provision in question is not to be so narrowly construed as to exclude from its protection the possessor or occupant of land having actual dominion over it, though the title is in another, or in others jointly or in common with him."

The case referred to by Judge Walker of 1 Ala. App. 148, supra, was decided by him, and in that case the indictment charged that the defendant set fire to or burned a barn of Josh Crim. Judge Walker, after observing that the indictment must aver the *ownership of the building burned*, said, "But the ownership to be proved relates to the actual occupancy, the dominion in fact over the thing, not to the nature of the estate or claim of the occupant. It is the possession, not the tenure or interest in the property, which should be described." The proof in that case showed that Crim had title to the property, but Cass Harrison, his ten-

ant, was in possession of it. The Court held that there was a fatal variance between the allegations and proof as to ownership.

In the case of *Melvin* v. *Scowley*, 213 Ala. 414, the Alabama Supreme Court, speaking through Justice Thomas, said:

> "The word 'own' is synonymous with 'possess', and the effect of defendant's testimony was that he possessed—was in possession of—the property mentioned. 'There is no substantial difference between the meaning of the words "possess" and "own". They are equivalent in common speech, and according to all the lexicographers.' Thomas *v.* Blair, 111 La. 683, 35 So. 813."

In the case of *Scandinavia Belting Co.* v. *Asbestos Co.*, 257 Fed. 937, 954, the Circuit Court of Appeals of the Second Circuit, certiorari denied by the Supreme Court, 250 U. S. 644, 63 L. Ed. 1186, in construing the meaning of the word "owner" as used in a statute, said:

> "It is an established rule governing the construction of statutes that they are to have a rational and sensible interpretation. The object which the legislative body sought to obtain and the evil which it endeavored to remedy may always be considered to ascertain its intention and to interpret its acts."

> "As applied to personal property, the term 'owner' includes the persons to whom a chattel belongs; the person who has the possession and control of a chattel; the person in possession and control of any article of personalty; * * * a bailee * * *. The person in control of a vehicle either mediately or immediately and not the literal and technical owner."

> 50 Corpus Juris 776.

> "A bailee has by virtue of the bailment and until its termination, a special property or possessory inter-

> est in the subject matter, which is equivalent to, or in the nature of, actual ownership except as against his bailor, and entitles him, whatever may be the class of bailment, to avail himself of any legal means to defend it."
>
> 8 Corpus Juris (Secundum), page 252.
> See also 30 Words & Phrases (Permanent Edition) page 659.

We conclude that either phrase of the Alabama Statute was broad enough to authorize service on the petitioner.

Was the petitioner corporation immune from service in Alabama because it had never qualified to do business in Alabama?

Petitioner contends first that under Section 232 of the Constitution of Alabama, a corporation which has not qualified to do business in this State is not subject to suit. The Supreme Court of Alabama has more than once expressly ruled to the contrary.

In *St. Mary's Oil Engine Co.* v. *Jackson Ice & Fuel Co.*, 224 Ala., 152, 155; 138 Sou. 834, service of process was had on a foreign corporation which had done business in the State, but had never qualified. The Court held that Section 232 of the State Constitution had no application, saying in pertinent part:

> "It appears without dispute that the defendant is a foreign corporation, and that it has not qualified to do business in Alabama; therefore the provisions of Section 232 of the Constitution requiring foreign corporations to qualify by establishing a place of business in this state and the designation of an agent upon whom process may be served, as a prerequisite to engaging in business in this state, and the statute enacted in pursuance thereof, in so far as they provide a mode of service on foreign corporations, are confined to corporations that have qualified thereunder, and are foreign to the question in this case."

In *Parker* v. *Central of Georgia Railway Co.*, 233 Alabama, 149, 170 Sou. 333, an action under the Federal Employer's Liability Act, was held maintainable in the State of Alabama, notwithstanding that the railroad company was not engaged in transacting business in the State at the time the suit was instituted. The Court said in part:

> "We have not held, nor has any other court so far as we know, that if there is effectual personal service on a foreign corporation in Alabama, the court was without power to render a judgment because defendant was a foreign corporation not doing business in Alabama, if the cause of action arose in Alabama."

Presumably the Legislature of Alabama complied with the State Constitution in enacting Alabama Code 1940, Title 7, Sec. 193 and Sec. 199, both set out in the appendix to this brief, and yet if petitioner's contention is correct, then Sec. 193 is void and Sec. 199 cannot apply to a nonresident corporation.

Petitioner next contends that service of process upon it in Alabama when at the time of such service it was not carrying on business there, would be in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. That contention, we respectfully submit, has been conclusively answered by this Court in the following cases:

In *Washington Ex Rel. Bond & Goodwin & Tucker, Inc.* v. *Superior Court*, 289 U. S. 361, 364; 77 L. ed. 1256, 1259, this Court said:

> "The State need not have admitted the corporation to do business within its borders * * * Admission might be conditioned upon the requirement of substituted service upon a person to be designated either by the corporation, * * * or might, as here, be upon the terms that if the corporation had failed to appoint or maintain an agent service should be made upon a

state officer, * * *. The provision that the liability thus to be served should continue after the withdrawal from the State afforded a lawful and constitutional protection of persons who had there transacted business with the appellant. * * *

"It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the reasonable conditions imposed."

In *Hess* v. *Pawloski*, 274 U. S. 352, 356, this court held that the statute of the State of Massachusetts in all respects similar to the Alabama statute here involved, was constitutionally valid and did not amount to the denial of due process of law under the Fourteenth Amendment of the Federal Constitution. In part the Court said:

"The state's power to regulate the use of its highways extends to their use by nonresidents as well as by residents. * * * And, in advance of the operation of a motor vehicle on its highway by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. Kane *v.* New Jersey, 242 U. S., 160, 167, 61 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. That case recognises power of the State to exclude a nonresident until the formal appointment is made. And, having the power so to exclude, the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served. * * * The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the 14th Amendment."

A similar statute of the State of New Jersey was upheld in *Wuchter* v. *Pizzutti*, 276 U. S. 13, 72 L. ed. 446.

In *Doherty & Co.* v. *Goodman*, 294 U. S. 623, 628, 79 L. ed. 1097-1100, in upholding a State statute permitting service of process on any agent or clerk employed in the office or

agency maintained in the State by nonresident corporations in all actions growing out of or connected with the business of that office or agency, this Court said in part:

> "The power of the states to impose terms upon nonresidents, as to activities within their borders, recently has been much discussed. Hess *v.* Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 S. Ct. 632; Wuchter *v.* Pizutti, 276 U. S. 276 13, 72 L. ed. 446, 48 S. Ct. 259, 57 A. L. R. 1230; Young *vs.* Masci, 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A. L. R. 170. Under these opinions it is established doctrine that a state may rightly direct that nonresidents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some 'provision making it reasonably probable that notice of the service on the Secretary will be communicated to the nonresident defendant who is sued'."

Petitioner's Claim of Privilege or Immunity.

The Circuit Court of Appeals disposed of this contention in one paragraph.

> "The argument that the defendants were engaged in work in aid of winning the war, and, therefore, immune from penalty or process, finds its support only in the patriotic impulses of the human heart but not in statute or precedent. Even a soldier, be he ever so vital to the Army, is not immune from either civil or criminal process."

Authorities are not needed to support the lower Court's opinion, but out of abundance of caution, we cite the following:

Bates v. *Clark*, 95 U. S. 204, 5 C. J. p. 364, Sec. 218, p. 366, Sec. 221;

Neu v. *McCarthy-Mass.* 33 N. E. (2) 570, 133 A. L. R. 1293.

In short, petitioner says that because this country is at war with Germany and Japan respondents suing for the death of their intestates have no causes of action against the petitioner.

Petitioner's contention is that because this country was at war so far as it was concerned Section 123, Title 7 of the Alabama Code was repealed. Let us ask the question, "What has petitioner done that has made it immune from the laws of Alabama and placed it upon a pedestal armed with a license to wrongfully take the lives of two of our citizens and go unwhipped of justice?" Petitioner answer the question by saying that at the time it committed these wrongs it was transporting a truck belonging to the Government that was to be used in the prosecution of the war.

Now let us ask another question, "Why and how did petitioner transport this truck?" For an answer to this question we will not go to petitioner's brief, but will go to the record filed in these causes.

Petitioner was incorporated in the State of Illinois long before the war began. Its business was that of transporting auto vehicles from factory to dealers. Its business was legitimate and was, we may assume without fear of contradiction, carried on for profit and not pro bono publico. In determining the pay it was to receive for transporting these vehicles in order to make this profit many things had to be taken into consideration. One of these things was based on the saying, "It is human to err." It knew that in operating these trucks upon the public highways of this Union the great probabilities were that it would from time to time become liable for damages under the laws of the different states of the Union for the wrongs, errors or mistakes of its servants or employees while operating the vehicles in these States. It knew that it would have to stand these losses by being its own insurer or it would have to pay premiums to

liability insurance companies to protect it from them. It is but natural to assume that these items of insurance premiums, or the probable losses that it would sustain if it was its own insurer, were added to the other items of expense incident to carrying on the business, and were finally paid for by its customers for whom it transported the vehicles. "Good business for profit" required this to be done. The war came on and it is common knowledge that the business of transporting auto vehicles from factory to dealers was greatly reduced if not paralyzed. The next thing we know petitioner's General Manager is in Washington, and we may ask the question here that the Judge in the District Court asked petitioner's attorney: "Did they go there though as a private corporation to get business from the Government just as contractors? Washington is full of people seeking business" (R. 102). Petitioner's General Manager, not a Government official, phoned to Reis from Washington and ordered him to go immediately to Atlanta and open a branch office there. Reis did this and thereafter as a common carrier for reward petitioner transported trucks for the Government. These transactions were evidenced by standard bills of lading issued by petitioner and followed by bills of lading issued by the Government after the deliveries of the trucks. These bills of lading showed the relationship that existed betwen petitioner and the Government. That relationship was that of carrier and shipper, nothing more and nothing less.

But what about the pay or compensation that petitioner received from our Government? What discounts or sacrifices did petitioner make to aid the Government in the prosecution of this war that should give it immunity from our laws? We will let this question be answered by petitioner's Branch Manager Reis, who said, "*The Government paid us the same as any other shipper paid us for*

hauling freight" (R. 113). Doubtless these payments included the item of expense hereinbefore referred to at some length.

The Government had nothing in the wide world to do with the selection of the Company's officials, nor its agents, servants or employees who would operate the trucks. Petitioner itself routed the trucks as shown by its bills of lading. Reis said that the only thing the Government required the Company to do after delivery of the trucks to the Company was to keep them greased and not run them faster than thirty-five miles an hour, the things that every purchaser of a new auto vehicle is cautioned to do for the first one thousand miles of travel.

Petitioner, so far as the United States Government was concerned, was nothing more and nothing less than an independent contractor voluntarily contracting with the Government at arms length with the end in view of making profit. The learned and just Judge of the District Court correctly sized up the situation during the trial of the cases in his remarks to petitioner's counsel. He said:

> "Looks to me like the force of your argument would be that every Government contractor in the United States would be absolutely immune from any kind of negligence on his part, or the part of his employees."
>
> * * * * * * *
>
> "My view of the law is that means nothing more or less than if they had been on the Southern Railroad Company or the L. & N. Railroad Company or any other kind of carrier. The same kind of bill of lading."
>
> "Your argument is that if they are hauling anything pertaining to the war, they could be absolutely reckless of everybody else's rights?"

There is not a thing in the entire record that tends to show that the Government had taken over the operation of petitioner's business or directed its operations in any

way. If such a condition had existed it was easily within the power of petitioner to show and prove it, and this it failed to do, doubtless for the reason that it could not. The only thing in the world that the Government did was what every other shipper of goods does, and that was to deliver the trucks to the carrier with instructions or directions as to where to carry them, and the carrier charged the Government for its services the same as it charged any other shipper. If this be true, and it certainly is if we are guided by the evidence found in the record and not by the conclusions found in petitioner's brief, then petitioner says, as we understand its brief, that it would be immune from the influence of the statute upon which the two death cases rest, and that this statute has been repealed in Alabama so far as petitioner is concerned.

Petitioner puts to task and condemns the Sheriff of Lowndes County for arresting Clark and putting him in jail. What this has to do with these cases we are unable to grasp. In passing, however, we ask, what should the Sheriff have done when arriving upon the scene of the tragedy he beheld two dying persons, an unconscious person, a demolished wagon and two dying mules, and heard the person who caused it all say that he was awake, and the cause of it all was a mule shied and threw the wagon in front of his truck; and then the Sheriff saw that the physical facts said to this person, "You are lying"? Would the answer be, put him in jail, where he belongs, as the Sheriff did, or pat him on the back and tell him to go on, as petitioner says he should have done?

Now to guard against such an emergency, if petitioner was so concerned in having the trucks delivered with great speed and without delay, why did it not have an additional person to go along on this journey with this convoy of five trucks to take the place of one of the drivers who might for any reason become disabled to continue to

drive? The answer to the question must be, petitioner's profits would have been reduced.

It is a fact known to all, and we may say judicially known to this Court, that many independent contractors who have dealt with the Government in the prosecution of the war have made enormous and unconscionable profits. Should these creatures, independent contractors who operate for profit and give to the Government nothing more than they give to everyone else, be made immune from our laws because our Government is at war? The question answers itself.

What has been said hereinbefore needs no authorities or precedents to support its soundness. Petitioner, however, *in spite of the record*, contends that it was a Government agency and says "that it would be liable for its wrongs inflicted on third persons in times of peace but not in times of war. The law is that a Government official is liable for its wrongs, war or no war, unless expressly exempted from such liability by some law.

Philadelphia Company v. *Stimson, Secy. of War*, 223 U. S. 605, 619, 56 L. Ed. 570;

Goltra v. *Weeks*, 271 U. S. 536, 544, 70 L. Ed. 1074, 1079.

Hopkins v. *Clemson Agricultural College*, 221 U. S. 636, 643, 55 L. Ed. 890, 894.

Missouri Pacific R. R. Co. v. *Ault*, 256 U. S. 553, 563, 65 L. Ed. 1087, 1092.

Belknap v. *Schild*, 161 U. S. 10.

Petitioner in its biref refers to and quotes from quite a number of cases. The principles announced in those cases are foreign to the principles involved in these cases, and we will not follow petitioner very far on this "sidetrack" other than to observe as follows:

Petitioner refers to the case of *Tennessee* v. *Davis*, 100 U. S. 257, and to the case of *Cunningham* v. *Neagle*, 135 U. S. 1, involving Justice Field, and concludes that in those two cases the State laws were abrogated and held for naught because the cases could be tried in the Federal Court. With the same reasoning every case removable to the Federal Courts from the State Courts would result in the abrogation of the State laws. In the two cases referred to by petitioner the defendants were officers of the United States Government. One was a Revenue Officer, the other a Deputy United States Marshal. They were charged with violation of the laws of the State. The Federal Statutes authorized the removal of the cases to the Federal Court if the acts were committed while the officer was in the discharge of his duties, the same as the Federal statute authorizes the removal from the State Courts to the Federal Courts of cases against nonresidents if the amount in controversy exceeds $3,000.00, by which authority this case was removed from the State Court to the Federal Court. Upon the trial of the cases in the Federal Courts the State statutes or laws are not abrogated or repealed, but the cases are tried in accord with those State statutes or laws unless they violate the Federal Constitution or some law passed by Congress that was authorized by the Federal Constitution.

Petitioner refers in its petition to some Alabama cases, *Howard* v. *Davis*, 209 Ala. 113 and *Heidtmuller* v. *L. & N. R. R. Co.*, 210 Ala. 538, that held that the Director General of Railroads during the last war was not subject to suit for the wrongful death of a third person, but petitioner failed to state why. The reason given by the Court was that the Government had taken charge of the operation of the railroads under a law which expressly provided that suits could not be brought against the Government for such penalties. See *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, 563, 65 L. Ed. 1087, 1092.

It follows from the foregoing that both reason and precedent say that Section 123, Title 7 of the Alabama Code, has not been repealed so far as petitioner is concerned and it must respond in damages for the wrongs done by it in causing the death of two human beings.

We respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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